

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

**CIVIL NO. 1:05CV58
(1:01CR52)**

ESTEBAN GARCIA, SR.,)	
)	
Petitioner,)	
)	
Vs.)	<u>ORDER</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
_____)	

THIS MATTER is before the Court on the Petitioner's motion pursuant to Federal Rule of Civil Procedure 60(b)(4) and (6) for relief from Judgment. The motion is denied.

I. PROCEDURAL HISTORY

In November 2001, Petitioner was convicted after jury trial of conspiring to possess with intent to distribute cocaine and methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Petitioner was sentenced on August 21, 2002, to 262 months imprisonment. His conviction and sentence were affirmed by the Fourth

Circuit on direct appeal and the Supreme Court denied his petition for a writ of *certiorari*. ***United States v. Sisk*, 87 F. App'x 323 (4th Cir.), cert. denied, 541 U.S. 1090 (2004).** On October 31, 2006, the Petitioner's motion pursuant to 28 U.S.C. § 2255 was denied by the undersigned. He appealed the Court's ruling and the Fourth Circuit denied a certificate of appealability and dismissed his appeal on April 24, 2007. ***Garcia v. United States*, 2007 WL 1203544 (4th Cir. 2007).**

The Petitioner states this motion should not be construed as one pursuant to § 2255, instead he seeks to correct "errors in the way the 2255 was heard." **Motion, at 2.**

II. DISCUSSION

Petitioner moves for relief pursuant to Rule 60(b) which provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for . . . any . . . reason justifying relief from the operation of the judgment."

The Petitioner states his claims of ineffective assistance of counsel rejected by this Court in his first § 2255 petition, "almost invariably require[] an evidentiary hearing." **Motion, *supra*.** However, the Fourth Circuit

disagreed and denied the issuance of a certificate of appealability because the Petitioner had failed to present "a substantial showing of the denial of a constitutional right" by failing to demonstrate "that reasonable jurists would find that any assessment of the constitutional claims by the district court [was] debatable or wrong and that any dispositive procedural ruling by the district court [was] likewise debatable." *Garcia, supra*, 2007 WL 1203544 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001)); see also 28 U.S.C. § 2253(c)(2).

The Petitioner argues he is entitled to an evidentiary hearing on the claims that have been ruled on by this Court as being without merit and have been dismissed on appeal. Therefore, the motion to reconsider is denied.

III. ORDER

IT IS, THEREFORE, ORDERED that the Petitioner's motion pursuant to Federal Rule of Civil Procedure 60(b)(4) and (6) is hereby **DENIED**.

Signed: June 5, 2007

A handwritten signature in black ink, appearing to read "Lacy H. Thornburg", written over a horizontal line.

Lacy H. Thornburg
United States District Judge

